SUPREME COURT, U. S.

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No. [redacted] 211

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

BROADWAY ENTERPRISE, INC.,
Petitioner,

vs.

LIQUOR CONTROL COMMISSION OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

WILLIAM J. ABRAHAM,
DAVID K. PURKEY,
16 East Broad Street, Columbus, Ohio,
Counsel for Petitioner.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

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JURISDICTION

The Supreme Court of Ohio overruled petitioner's motion to certify the record on March 12, 1969. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3).

QUESTIONS PRESENTED

1. Whether or not the Ohio Liquor Control Commission and the State Courts should apply the constitutional tests of "obscenity" in their interpretation of the Ohio Liquor Control Act and Regulations, wherein certain obscene and immoral acts of expression are prohibited in retail liquor premises such as night clubs?

2. If the answer to question one is in the affirmative, whether or not the Liquor Commission of Ohio and the State Courts are bound by the United States Supreme Court's definition of "immorality", or whether a double standard is permissible in connection with acts of expression in night clubs?

3. If the answer to question two is yes, whether or not the constitutional test announced by this Court requires proof of contemporary community standards in cases where the performance (dance) alleged to be "obscene" or "immoral" is not patently obscene and is conducted by a female who is fully clothed and makes no contact with other persons?

4. Where a retail liquor permit holder is granted the right to a quasi-judicial hearing by the State before his liquor permit privileges may be suspended or revoked, is he denied due process of law under the provisions of the 14th Amendment to the United States Constitution, when such hearing is nothing more than a sham?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Ohio Liquor Control Regulation, L.C.C.—1-52, provides:

> "No permit holder shall knowingly or willfully allow in, upon or about the licensed premises improper conduct of any kind, type or character; any improper disturbances; lewd, immoral activities or brawls; or any indecent, profane, or obscene language, songs, entertainment, literature, pictures or advertising materials; nor shall any entertainment consisting of the spoken language or songs which can or may convey either directly or by implication an immoral meaning be permitted in, upon or about the permit premises.
> "Entertainment consisting of dancing either solo or otherwise, which may or can, either directly or by implication, suggest an immoral act is prohibited. Nor shall any permit holder possess or cause to have printed or distributed any lewd, immoral, indecent or obscene literature, pictures or advertising material." (Effective July 5, 1950).

STATEMENT OF THE CASE

The petitioner is the holder of a D-5 liquor permit, under authority of which petitioner is permitted to operate a restaurant-night club business known as "Broadway Restaurant", in Columbus, Ohio.

This matter began in an administrative proceeding before the Ohio Liquor Control Commission when petitioner was charged with a violation of L.C.C.—1-52, in the following language:

> "On July 28, 1967, your agent, James Stein did allow in and upon the permit premises, entertainment con-

sisting of dancing which may or can either directly or by implication suggest an immoral act in violation of L.C.C.—1-52, a regulation of the Ohio Liquor Control Commission."

During petitioner's hearing before the Liquor Control Commission, petitioner moved to dismiss the citation against it for the reason that no evidence was offered to prove "contemporary community standards". This motion was overruled. Appendix A, at page 12. The Commission ordered that petitioner's permit be suspended for a period of 42 days.

Petitioner appealed this decision to the Court of Common Pleas of Franklin County, Ohio, which Court affirmed the order of the Liquor Control Commission. The Court stated in its decision, dated April 2, 1968, that the cases of the Supreme Court of the United States involving "national standards" to determine obscenity are not applicable to liquor cases, Appendix B at page 14.

Petitioner subsequently perfected an appeal to the Court of Appeals of Franklin County, Ohio and again argued that *U.S. v. Roth* and the cases following it were applicable to the case at bar and that contemporary community standards must be shown in order to decide obscenity in this case. The Court affirmed the Common Pleas Court and refused to consider the issue on the merits.
September 24, 1968. Appendix C, at page 19.

Petitioner then moved in the Supreme Court of Ohio, for an order directing the Court of Appeals for Franklin County to certify its record. This motion was overruled on March 12, 1969. Appendix E, at page 24.

REASONS FOR GRANTING THE WRIT

Petitioner states that the question presented in this case involves an Ohio Liquor Regulation dealing with the prohibition of immoral, indecent, profane or obscene language,

songs, entertainment, literature, pictures or advertising and/or entertainment consisting of the spoken language, songs or dances which can or may convey either directly, or by implication an immoral meaning.

More particularly, petitioner states that in this and other liquor cases, the Liquor Control Commission of Ohio and the Ohio Courts have refused to consider the application of objective community standards in defining immoral acts, and have not required the presentation of any competent evidence to establish even local community standards, thus opening the door to inevitable double standards within the limits of even small geographical areas.

Petitioner admits that the Liquor Control Commission has authority to control practically all conduct in and upon liquor permit premises, by regulation properly adopted and enforced. Nor is there any question that wide latitude is given the Liquor Control Commission in its regulation of the liquor industry due to the harmful potentialities of the liquor business, but under the laws of Ohio a permit holder has been granted the right to a hearing before his permit privileges can be suspended or revoked, and under the Administrative Procedure Act and The Liquor Control Regulations, the burden of proof is upon the Department of Liquor Control to prove its case against the permit holder by reliable, substantial and probative evidence. This requirement does not generally create a constitutional issue.

However, in the instant case we are confronted with a state regulation that purports to infringe upon an inalienable right which is fundamental to the basic concept of liberty in a free land, to wit: the right of freedom of expression. Secondly, the problem is one of basic procedural due process involving the effective denial of a fair hearing within the historical judicial meaning of the term.

Again, petitioner recognizes that the liquor industry is

an extremely regulated business and that a state may not be required to grant a license to one to sell alcoholic beverages. But once that license is granted, the State may not act in a "highhanded" manner and deny petitioner its rights guaranteed by the Federal Constitution. See *Griffin v. Illinois,* 351 U.S. 12, 18 (1956).

Since L.C.C.—1-52 does not define the words "immoral dancing" a decision as to whether an alleged act violates the regulation in question must be determined in accordance with standards set forth in judicial decisions. If this were not true, the trier of the facts would be in a position of arbitrarily applying a subjective test to determine whether the right of self expression is to be banned on a subjective basis. By permitting a subjective test in making this determination it seems almost positive that a double standard of obscenity would prevail in small areas. This would not only be confusing, but would create absolute chaos, for in one instance the courts say that certain tests should be applied to determine obscenity and immorality and in yet another instance the same tests do not apply. Either a dance is obscene or it is not.

In the instant case the liquor inspectors described the dance in question to the Commission. The dancer was fully clothed and made no contact with any other person. The question before the Commission was whether the dancer's movement of the hands, arms and body were immoral or suggestive of an immoral act. If the triers of the fact were totally unaware of generally accepted dance movements in the community, which may suggest a sexual act, we would have a conviction for immoral conduct by uninformed persons who have not kept themselves abreast of current community morals or behavior. Furthermore, isn't it a fact that many movements made by individuals are suggestive of a sexual act, but does that mean it is suggestive of an

immoral act? If it were, we would all be in jail. It may well be that if the test were permitted to be on a subjective basis, at totally unacceptable and immoral acts could be found to be moral. A subjective test by a three member commission could bring about one result or the other.

Petitioner asserts that the activity in question, i.e., dancing comes within the purview of the due process clause of the Fourteenth Amendment to the United States Constitution as does the right to a fair hearing since the legislature has seen fit to grant a hearing to liquor permit holders. Ohio Revised Code, Sections 4301.04, Administrative adjudication generally requires a full hearing, *Goldsmith v. U.S. Board of Tax Appeals,* 270 U.S. 117 (1926).

The leading case in the United States wherein obscene and immoral conduct is defined in *U.S. v. Roth,* 354 U.S. 476, decided by the United States Supreme Court. In that case the Court held that:

> Three elements must coalesce:
>
> 1. The dominant theme of the material taken as a whole appeals to prurient interest in sex.
> 2. The material is patently offensive because it affronts contemporary community standards relating to description or representation of sexual matters; and
> 3. The material is utterly without redeeming social value.

In *State v. Mazer,* 3 Ohio App. 2d, 90, the Court held that the rule as laid down in the *Roth* case applies in Ohio.

In addition to applying to printed matter, such as books and photographs, the same standards are also extended to motion pictures, plays and burlesque shows, which are forms of speech and *prima facie* expressions of the First Amendment. *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 72 S. Ct. 777, 96 L.Ed. 1098 (1952) (Motion Picture); *Adams Theater Company v. Keenan,* 12 N.J. 267, 96 A. 2d 519 (1953) (Burlesque Show); *Adams Newark Theatre*

Co. v. City of Newark, 22 N.J. 472, 126 A. 2nd 340 (1956) (Burlesque Show):

The fact that such a right is constitutionally protected does not preclude its being regulated by the state and this is without a doubt true in respect to the control of the liquor business. *Solomon v. Liquor Control Commission* (1965), 4 Ohio St. 2d 31. Although the writer is certain that the State of Ohio cannot constitutionally place complete and total restrictions on certain basic rights even in liquor establishments, it is equally true that certain rights may be regulated with less emphasis on permissive criteria than would be required when the legislation is directed to persons who are not so engaged.

However, in the instant case we do not have a situation where the State of Ohio has completely outlawed dancing on the permit premises, but merely dancing which can directly or indirectly suggest "immoral" acts. Who is the well rounded-fully informed person or persons capable of making this judgment on a subjective basis? Appellant contends that only an objective test may be applied if a fair and intelligent decision is to be reached.

In *Adams Newark Theater Co. v. City of Newark*, 12 N.J. 267, 96 A. 2d (1953), it was stated that:

> "The scope of permissible limitation of speech is generally confined to proscribing what is lewd, obscene or indecent—this compacts with the terms of the original ordinances. *But the words quoted are essentially meaningless and insubstantial unless reference is made to the manner in which the judiciary has defined them.*"

The prevailing case law which the Liquor Control Commission should have applied indicates that an immoral or obscene act must be shown to have fallen below "prevailing community standards." In *Hudson v. United States*, 234 A. 2d 903, (1967), it was held that:

> "The Constitutional test of "obscenity" is whether,

to the average person applying 'contemporary community standards' the dominant theme of the material as a whole appeals to a prurient interest in sex."

* * * - - - - - - - - - *

"Where the material involved is not patently obscene or 'hard core pornography' neither judge nor twelve local jurors chosen at random are capable of determining the standards of tolerance prevalent in the nation generally *without first being given some competent evidence of what these standards are.* (emphasis added)

Furthermore, it is not sufficient to present evidence which tends to establish a local community standard. The *Hudson case* held that:

"In the District of Columbia, community standards in obscenity cases shall be determined by reference to contemporary community standards in the nation as a whole."

In *Jacobellis v. Ohio,* 378 U.S. 184, (1964), Mr. Justice Brennan, in delivering the majority opinion stated:

"The Court has explicitly refused to tolerate a result whereby 'the constitutional limits of free expression in the nation would vary with state lines.' *Pennekamp v. Florida,* 328 U.S., at 335, at 194."

Again, petitioner states that the Courts of Ohio have adopted the view that constitutional procedural protections do not, generally apply to liquor cases, but the instant case is different than the other liquor cases wherein the courts have considered constitutional questions. Here we have a dancer who was fully clothed, who was charged with making movements with her hands, arms and other parts of the body which suggested an immoral act. It is elementary that the burden of proving the offense was upon the respondent. These movements certainly cannot be considered patently obscene and, the Department having failed to produce any evidence as to dances, generally accepted in the community and the fact that this one was not included

would allow the Liquor Control Commission members to speculate as to what people may or may not be generally doing in the community. Any reasonable interpretation of the scope and purpose of L.C.C.—1-52 must lead to the conclusion that the conduct of persons and employees on permit premises cannot be permitted to fall below the standard of morality of the nation as a whole. If competent evidence is not presented to establish the standard by which the act should be judged, how does one know an offense has occurred? To conclude that the issuance of a liquor permit to the appellant allows the state to penalize as indecent, conduct which may in fact meet contemporary community standards of decency and further allows the state to apply a subjective test in the determination of that which is moral and that which is not would be an arbitrary denial of procedural due process of law so that the right to a trial or hearing in any sense of the word would be withdrawn. This would appear to be an unreasonable and unnecessary extension of the regulatory power of the Liquor Control Commission.

CONCLUSION

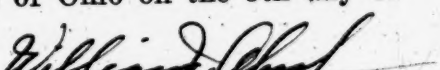
For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

William J. Abraham,
David K. Purkey,
16 East Broad Street, Columbus, Ohio,
Counsel for Petitioner.

CERTIFICATE

The undersigned hereby certifies that he is duly admitted to practice before this Court and that he has personally served a copy of the petition for a writ of certiorari on the Attorney General of the State of Ohio on the 5th day of June, 1969.



WILLIAM S. ABRAHAM,
Counsel for Petitioner.

APPENDIX A

"Before The Liquor Control Commission, State of Ohio

BROADWAY ENTERPRISES, INC.
dba Broadway Restaurant
3770 West Broad Street
Columbus, Ohio
Franklin County
Class D-5 Permit
Certificate No. 0966421 (10/1/66)

Docket No. 3420
Case No. 1328-67
219 South High Street
Columbus, Ohio
October 3, 1967

This cause came on to be heard on the charge brought against the above permit holder, to-wit:.

> "On July 28, 1967, your agent, James Stein, did allow in and upon the permit premises, entertainment consisting of dancing which may or can either directly or by implication suggest an immoral act, in violation of LCC-1-52, a regulation of the Ohio Liquor Control Commission."

and said permit holder was duly served with a copy of said charge and notice of the hearing thereon.

And said permit holder, appearing before the Liquor Control Commission to answer said charge, denied the same, and thereupon the matter was submitted to the Liquor Control Commission on the evidence, and said Commission, in consideration thereof, finds that the allegations of the Director of Liquor Control are well taken and supported by the evidence and orders the above permit suspended.

It is therefore ordered and adjudged that Class D-5 per-

mit, Certificate No. 0966421, be and the same is hereby suspended for a period of forty-two (42) days, said penalty to be served consecutively to the thirty-five days suspension ordered imposed by the Liquor Control Commission in Case No. 1045-67, to-wit: beginning at noon, December 7, 1967, and ending at noon, January 18, 1968.

LIQUOR CONTROL COMMISSION
STATE OF OHIO

BERNARD T. CHUPKA, Vice Chairman
J. MAYNARD DICKERSON, *Member*

Chairman Kenneth E. Thomas—Not Participating

Mailed: 11/8/67

EM

APPENDIX B

COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

BROADWAY ENTERPRISES, INC.,
dba Broadway Restaurant,
Appellant,

vs.

LIQUOR CONTROL COMMISSION,
Appellee.

No. 232,164

DECISION

Rendered this 2nd day of April, 1968.

STERN, J.

This is an appeal from a suspension order issued by the Liquor Control Commission for allowing by the appellant's agent in and upon the permit premises entertainment consisting of dancing which did or could either directly or by implication suggest an immoral act.

Appellant contends that the suspension order should be reversed for the reasons that:

1) The Director of The Department of Liquor Control failed to prove that one James Stein was an agent of the permit-holder.

2) That said agent knowingly allowed certain conduct in and upon the permit premises.

3) That said conduct directly or by implication suggested an immoral act.

The evidence as to the activity of James Stein in the permit premises is undisputed that he took orders from patrons, served drinks, received payment therefor, deposited the money in the cash register, accepted the viola-

tion notice from the liquor inspector, and admitted to the inspector that he was an agent of the permitholder. The permitholder did not offer any testimony to refute the Director's testimony as to the "agency" of Stein. It is true that the burden of proof rests with the Director to establish a case against a permitholder. A violation of a regulation or statute heard by the Liquor Control Commission upon a violation charge is a civil proceeding. The Director established a prima facie case of agency. See 21 Ohio Jur. 2nd, Sec. 102 et seq. The record on this ground establishes reliable, probative and substantial evidence that James Stein was an agent of the permitholder.

As to the allegation that the permitholder allowed the "Go-Go" dancer, Eva Stein, to dance in a manner that either directly or by implication suggested an immoral act is a matter that this Court cannot substitute its judgment for the judgment made by The Liquor Control Commission. The Commission saw and heard the witnesses. The record only describes that which was testified to before the Liquor Control Commission. The testimony of each of the three liquor inspectors who testified is to the effect that the dance of the entertainer suggested an immoral act. The inspectors not only described the immoral act, but explained the dance by bodily action, so that an interpretation of the type is best left to the trier of the facts.

Counsel for appellant cite various decisions of the Supreme Court of the United States as to "national standards to determine obscenity." These cases are not applicable to the case at bar.

In the first place Regulation 52 is a valid enactment by The Liquor Control Commission to prohibit indecent entertainment upon premises where intoxicating liquors are sold and consumed. Appellant's agent was on the premises while the "Go-Go" performed her dance and saw the dance.

In *Rahl v. Liquor Control Commission,* 1 Ohio App. 2nd 263 Judge Duffey of the Franklin County Court of Appeals points out (page 265), that Regulation 52 concerns itself with improper conduct which the permitholder permits, and its primary thrust is the acts of others, whether employees, patrons or simply persons permitted on the premises. There is no question that the "Go-Go" dancer was on the premises at the behest of the permitholder for the entertainment of the patrons present.

The question as to what constitutes improper entertainment was thoroughly considered in *Ivan Freedman v. Liquor Control Commission,* Franklin County Court of Appeals (1968), case No. 8938.

The Director in the instant case established reliable, substantial and probative evidence that the entertainment allowed on the permitholder's premises was in violation of Regulation 52.

The order of suspension of the Liquor Control Commission is affirmed. Appeal dismissed.

/s/ Leonard J. Stern,
Judge.

Appearances:

David K. Purkey
and
William J. Abraham
16 East Broad Street
Attorneys for Appellant.

William B. Saxbe, *Attorney General*
James E. Rattan, *Ass't Attorney General*
Attorneys for Appellee.

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

BROADWAY ENTERPRISES, INC.,
dba Broadway Restaurant,

Appellant,

vs.

LIQUOR CONTROL COMMISSION,

Appellee.

Case No. 232,164

JOURNAL ENTRY

This cause came on to be heard upon the appeal from the order of the Liquor Control Commission suspending appellant's D-5 liquor permit privileges for a period of 42 days; and, upon consideration of the record of proceedings before the Liquor Control Commission, together with briefs and arguments of counsel, the Court, being fully advised in the premises, finds said order is supported by reliable, probative, and substantial evidence and is in accordance with law.

It is, therefore, Ordered, Adjudged, and Decreed that the aforesaid order of the Liquor Control Commission be, and the same hereby is affirmed, and that the former order of this court suspending execution of said order of the Liquor Control Commission be vacated and dissolved effective twenty days from the date of this entry unless appellant sooner perfects an appeal in this cause.

Costs taxed to appellant and bond released upon payment thereof.

Exceptions to appellant.

STERN, J.

Approved:

.....

WILLIAM J. ABRAHAM
DAVID K. PURKEY
Attorneys for Appellant.

.....

JAMES E. RATTAN
Assistant Attorney General
Attorney for Appellee.

APPENDIX C

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

BROADWAY ENTERPRISES, INC.,
dba Broadway Restaurant,
Appellant-Appellant,

v.

LIQUOR CONTROL COMMISSION OF THE STATE OF OHIO,
Appellee-Appellee.

No. 9151

DECISION

Rendered on September 24, 1968.

MR. WILLIAM J. ABRAHAM and
MR. DAVID K. PURKEY,
16 East Broad Street,
Columbus, Ohio,
For Appellant-Appellant.

MR. WILLIAM B. SAXBE, *Attorney General,*
MR. JAMES E. RATTAN, *Assistant,*
Statehouse Annex,
Columbus, Ohio,
For Appellee-Appellee.

TROOP, J.

This appeal is from a judgment of the Common Pleas Court affirming an order of suspension issued by the Liquor Control Commission to the appellant, Broadway Enterprises, Inc. The permit held by appellant was suspended by the commission under authority of Section 4301.25, Re-

vised Code, for a violation of Regulation 52 of the Liquor Control Commission prohibiting dancing on permit premises "which may or can, either directly or indirectly or by implication suggest an immoral act."

The Court of Common Pleas found that the case against the permit holder was supported by reliable, substantial, and probative evidence. This the appellant assigns as error, urging that the director failed to show that the person who allowed the violation was an agent of the permit holder and failed to show an applicable community standard by which the immorality of the questioned dance might be measured.

This is a civil action and the permit holder offered no evidence whatsoever on its behalf at the hearing before the commission. The transcript of the evidence taken at that hearing is the basis for the consideration given by the Common Pleas Court and is on for review in this appeal.

Judge Stern found James Stein to be the agent of the permit holder by independent evidence, i. e., "he took orders from patrons, served drinks, received payment therefor, deposited the money in the cash register, accepted the violation notice from the liquor inspector," all of which is in addition to his admission that he was an agent of the permit holder. (Decision filed April 2, 1968, page 2. See also 2 Ohio Jurisprudence 2d 284, Section 200, and *Rahal v. Liquor Control Comm.*, 1 Ohio App. 2d 263, at page 267, which deals with the problems incident to corporate permit holders and the agents of such.)

The question of the immorality of the incident giving rise to the charge in the instant case does not concern a matter of the violation of constitutional rights in which the community standards test might become involved, but simply brings into consideration Regulation 52 of the commission. Immorality as related to the regulation is discussed at

length in a decision of this court in *Ivan Freedman v. Liquor Control Comm.*, issued March 5, 1968, Case No. 8938, in which there is a quotation from *Solomon v. Liquor Control Commission* (1965), 4 Ohio St. 2d 31. The emphasis in the quote from Judge Zimmerman is on the harmful potentialities of the permit business and the necessity of strict control by statutes and regulations.

The evidence adduced by the director in the hearing before the commission stands undisputed. An examination of the transcript of testimony supports the conclusion reached by the Court of Common Pleas that it is reliable, substantial and probative.

The judgment affirming the order of the Liquor Control Commission entered by the Common Pleas Court is affirmed and the appeal dismissed at appellant's costs.

HERBERT, J., concurs.

DUFFEY, P. J., concurs in judgment.

APPENDIX D

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

BROADWAY ENTERPRISES, INC.,
dba Broadway Restaurant,
Appellant,

vs.

LIQUOR CONTROL COMMISSION,
Appellee.

No. 9151

JOURNAL ENTRY

This cause came on to be heard on appeal from the decision and order of the Court of Common Pleas of Franklin County which affirmed an order of the Liquor Control Commission suspending appellant's class D-5 liquor permit for a period of 42 days; and, upon consideration of the assignments of error and the record of proceedings before said Commission together with the briefs and arguments of counsel, the court, being fully advised in the premises, finds that appellant's assignments of error are not well taken and that there is no error in the findings of the court below that the order of the Liquor Control Commission is supported by reliable, probative, and substantial evidence and is in accordance with law.

It is, therefore, ORDERED that the decision and order of the Court of Common Pleas of Franklin County herein appealed be, and the same hereby is, affirmed at appellant's costs.

Exceptions to appellant.

TROOP, J.
HERBERT, J.
DUFFEY, J.

APPROVED:

WILLIAM J. ABRAHAM,
DAVID K. PURKEY,
Attorneys for Appellant,

JAMES E. RATTAN,
Assistant Attorney General,
Attorney for Appellee.

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF OHIO

No. 68-639

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR FRANKLIN COUNTY TO CERTIFY ITS RECORD.

It is ordered by the Court that this motion is overruled.

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FILED
JUL 5 1969
JOHN F. DAVIS, CLERK

No. [redacted] 211

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

BROADWAY ENTERPRISES, INC.,
Petitioner,

vs.

LIQUOR CONTROL COMMISSION OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PAUL W. BROWN,
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SHELBY V. HUTCHINS,
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State House Annex, Columbus, Ohio,
Counsel for Respondent,

JAMES E. RATTAN,
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MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1496

BROADWAY ENTERPRISES, INC.,
Petitioner,

vs.

LIQUOR CONTROL COMMISSION OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

QUESTION PRESENTED

May the State of Ohio provide for, and carry out, suspension of Ohio retail liquor permit privileges where a liquor permit holder allows entertainment consisting of dancing which may or can suggest an immoral act, on the liquor permit premises?

§ 4303.18 D-5 permit.

Permit D-5 may be issued to the owner or operator of a night club to sell beer and any intoxicating liquor at retail, only by the individual drink in glass and from the container, for consumption on the premises where sold, only at tables where meals are served; and to sell the same products in the same manner and amounts not for consumption on the premises as may be sold by holders of D-1 and D-2 permits. A person who is the holder of both a D-3 and D-3a permit need not obtain a D-5 permit. The fee for this permit is one thousand dollars.

§ 4301.25 Suspension or revocation of permit.

The board of liquor control may suspend or revoke any permit issued pursuant to Chapters 4301. and 4303. of the Revised Code for the violation of any of the applicable restrictions of such chapters or of any lawful rule or regulation of the board or other sufficient cause, and for the following causes:

(A) For conviction of the holder or his agent or employee for violating a section of Chapters 4301. and 4303. of the Revised Code or for a felony;

(B) For making any false material statement in an application for a permit;

(C) For assigning, transferring, or pledging a permit contrary to the rules and regulations of the board;

(D) For selling or promising to sell beer or intoxicating liquor to a wholesale or retail dealer who is not a holder of a proper permit at the time of the sale or promise;

(E) For failure of the holder of a permit to pay an excise tax together with any penalties imposed by the law relating thereto and for violation of any rule or regulation of the department of taxation in pursuance thereof.

§ 4301.03 Rules and regulations.

The liquor control commission may adopt and promulgate, repeal, rescind, and amend, in the manner required by this section, rules, regulations, standards, requirements, and orders necessary to carry out Chapters 4301. and 4303. of the Revised Code, but all rules and regulations of the board of liquor control which were in effect immediately prior to April 17, 1963 shall remain in full force and effect as rules and regulations of the liquor control commission until and unless amended or repealed by the liquor control commission. The rules and regulations of the liquor control commission may include the following:

* * * * * * * * *

(B) Rules, regulations, and orders providing in detail for the conduct of any retail business authorized under permits issued pursuant to such chapters, with a view to insuring compliance with such chapters and laws relative thereto, and the maintenance of public decency, sobriety, and good order in any place licensed under such permits;

* * * * * * * * *

LCc-1-52. Entertainment—Prohibition Against Improper Conduct.

No permit holder shall knowingly or willfully allow in, upon or about his licensed premises improper conduct of any kind, type or character; any improper disturbances; lewd, immoral activities or brawls; or any indecent, profane, or obscene language, songs, entertainment, literature, pictures, or advertising materials; nor shall any entertainment consisting of the spoken language or songs which can or may convey either directly or by implication an immoral meaning be permitted in, upon or about the permit premises.

Entertainment consisting of dancing, either solo or other-

wise, which may or can, either directly or by implication, suggest an immoral act is prohibited. Nor shall any permit holder possess or cause to have printed or distributed any lewd, immoral, indecent, or obscene literature, pictures or advertising material.

STATEMENT OF THE CASE

Petitioner is the holder of a class D-5 (nightclub) Ohio liquor permit (Section 4303.18, Ohio Revised Code). This case began when Petitioner was cited to appear before a state administrative agency, the Liquor Control Commission, to determine whether such permit should be suspended or revoked upon the ground that Petitioner had allowed "entertainment consisting of dancing, either solo or otherwise, which may or can, either directly or by implication, suggest an immoral act," upon its permit premises, in violation of Ohio liquor regulation LCc-1-52.

At hearing before the administrative agency, three Ohio liquor investigators testified in support of the charge made, describing in detail the dance in question and, in several instances, physically demonstrating portions of it. Petitioner presented nothing in defense other than cross-examination and its arguments as to the nature of the dance and the alleged constitutional requirement that the Commission hear evidence on contemporary community standards of obscenity and morality in order to make a valid ruling.

The result of the administrative hearing was an order under authority of Section 4301.25, Ohio Revised Code, and the provisions of the Ohio Administrative Procedure Act (Chapter 119, Ohio Revised Code) to suspend Petitioner's liquor permit privileges for a period of 28 days. Appeal of that order through the Ohio courts, in which Respondent agency became Appellee, was unsuccessful, and

Petitioner now seeks review of the claimed constitutional question here.

REASONS FOR DENYING THE WRIT

At the outset, it should be clearly understood that the order of the Ohio Liquor Control Commission, out of which this case arises, deals with *nothing* but the privilege of conducting the retail liquor business in the State of Ohio under an Ohio liquor permit. The Ohio Liquor Control Commission has power to deal with nothing more. The order here in question, therefore, does not involve life, liberty or property, merely a licensed privilege (*Solomon v. Liquor Control Commission*, 4 Ohio St. 2d 31; *Abraham v. Fioramonte*, 158 Ohio St. 213; *State ex rel Zugravu v. O'Brien*, 130 Ohio St. 23).

As provided in Section 4301.25, supra, the Ohio Liquor Control Commission is empowered to revoke or suspend Ohio liquor permits for, among others, violation of any applicable restriction of The Ohio Liquor Control Act (Chapters 4301 and 4303, Ohio Revised Code) or the Commission's duly adopted regulations. Regulation LCc-1-52 of the Liquor Control Commission contains several such restrictions and, as here pertinent, provides as follows:

* * * * * * * * *

> "Entertainment consisting of dancing, either solo or otherwise, which may or can, either directly or by implication, suggest an immoral act is prohibited. * * *"

Adoption of such a regulation to control conduct on liquor permit premises is specifically authorized by Section 4301.03(B), Ohio Revised Code.

The status and rights of Ohio liquor permit holders under this type of regulatory restriction have been described by the Ohio Supreme Court as follows:

". . . (I)t is of importance to consider the nature

> of the liquor business, particularly as it here relates to the dispensing and sale of intoxicating liquor at retail by the glass. Because of the harmful potentialities incident to the conduct of such business, those engaging therein must obtain a permit from the state and are thereafter subject to strict regulation by statute and by rules and regulations adopted and promulgated pursuant to statutory authority by the Department of Liquor Control, the regulating and supervising agency created by the state to oversee and police, as it were, the liquor business. One who applies for and is issued a permit to sell alcoholic beverages thereby assents to the reasonable and lawful conditions imposed by statute and rule."
> (*Solomon v. Liquor Control Commission*, 4 Ohio St. 2d 31, 34 (1965), cert. denied. May 2, 1966).

There is no constitutional right to carry on the liquor business (*Giozza v. Tiernan*, 148 U.S. 657 (1893)). It has long been settled that ". . . on account of their well known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a state has the power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guaranties of the 14th Amendment." (*Crane v. Campbell*, 245 U. S. 305, 307 (1917)) "Having the power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants . . ." a state may permit these things under only definitely prescribed conditions. "The greater power includes the less . . . The state may protect her people against evil incident to intoxicants . . . and may exercise large discretion as to the means employed." (*Ziffrin v. Reeves*, 308 U.S. 133, 138, 139 (1939))

In this case the State of Ohio, through its Liquor Control Commission, has considered it in the interest of her people to place broad limits upon the sort of entertainment that

may be presented upon a licensed permit premises. Assuming arguendo that such limits were too broad to be applied generally without invading constitutionally protected rights, they would, we submit, still be entirely permissible limits in this type of administrative regulation of the liquor business.

There is no threat or possibility here of placing Petitioners' owners or employees in jail or of taking their property. Nor is there any limitation placed upon their rights of free speech or free expression generally. Only in the case of certain forms of expression, exceeding express limits on the exercise of a licensed privilege, on the licensed premises, are any sanctions provided, and then they extend only to suspension or termination of that licensed privilege.

From the authorities it would clearly appear that the State of Ohio could choose to prohibit in this manner all live intertainment on liquor permit premises, or all entertainment consisting of dancing. That is, the state could establish such prohibitions as conditions on the continued exercise of the licensed privilege, without infringing on constitutionally protected rights. If that is so, then it is rather difficult to conceive how any prohibition on only certain kinds of entertainment or dancing could amount to such an infringement.

If the theories advanced in Petitioner's brief were correct, the State of Ohio would be obliged to allow topless go-go girls, or topless waitresses, or performances of nude theatricals in its licensed liquor permit premises, if such could be shown to be within "contemporary community standards." We certainly do not understand that to be the law on this point. The State of Ohio can not be required to permit nudity or suggestive entertainment in nightclubs and taverns, just because California or New York or, for that matter, the entire remainder of the country do. Peti-

tioner has no right to carry on the liquor business at all, let alone carry it on in conjunction with any particular kind of entertainment, whether or not the latter is constitutionally protected from criminal prosecution or general restraint.

CONCLUSION

It is the state-controlled privilege of carrying on the liquor business that has been acted on in this case, not life, liberty or property or the constitutionally protected right of freedom of speech and expression. Petitioner's case presents no federal question of substance for review by this Court. The writ prayed for should therefore, be denied.

Respectfully submitted,

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